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EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. ("WCA") believes that the Commission's *Further Notice of Proposed Rulemaking* ("FNPRM") represents a significant step towards defining the "rules of the road" governing the use of the installed base of cabling in the MDU environment when a building owner or an individual tenant wishes to switch service providers. The Commission should note, however, that adoption of the rules proposed in the *FNPRM*, even with the minor modifications WCA suggests herein, will not fully address the problems faced by MVPDs seeking to compete in the MDU market. To the contrary, before there can be full and fair competition in the MDU market, the Commission will need to adopt WCA's proposals for (1) preemption of discriminatory state mandatory access laws and (2) a "fresh look" policy with respect to long-term exclusive contracts between MDU owners and cable operators.

WCA believes that the Commission's pro-competitive objectives will be thwarted unless its rules for disposition of "home run" wiring are crafted to severely penalize any incumbent cable operator who falsely states it will remove its wiring, thereby forces its competitors to "postwire" MDU property, but fails to timely remove the wiring. To that end, WCA herein proposes that the Commission impose a base forfeiture of no less than \$500 per-unit where an incumbent cable operator makes a false removal election. This is the only truly effective means of counteracting the cable industry's enormous economic incentive to hamper competitive entry by new service providers through manipulation of the "remove/abandon/sell" election process.

WCA further submits that the Commission should facilitate an efficient transition to the new service provider by declaring that the relevant notice periods will continue to run regardless of whether the incumbent cable operator makes a claim that it has a legal right to remain on the property. This proposal correctly places on the incumbent the burden of expeditiously establishing (e.g., through a court order) its rights *during* the relevant notice period. WCA also supports a more expedited timetable for unit-by-unit disposition of home run wiring. In addition, to discourage incumbent cable operators from manipulating state mandatory access statutes to their advantage, the Commission should declare that a cable operator may not use a state mandatory access statute to block a competitor's access to unused wiring in moldings and conduits *regardless* of whether the operator's access rights are contingent upon a request for service from the tenant. Finally, to ensure that cable's competitors always have full and fair access to the cable home wiring demarcation point, WCA recommends that the demarcation point be moved to the junction box (or as close as possible thereto) if the original demarcation point cannot be physically reached without cutting into walls or conduits.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of)	
)	
Telecommunications Services)	CS Docket No. 95-184
Inside Wiring)	
)	
Customer Premises Equipment)	
)	
Implementation of the Cable Television)	
Consumer Protection and Competition)	MM Docket No. 92-260
Act of 1992)	
)	
Cable Home Wiring)	

**COMMENTS IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULEMAKING**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the *Further Notice of Proposed Rulemaking* ("FNPRM") released by the Commission on August 28, 1997 in this proceeding.¹

I. INTRODUCTION.

The *FNPRM* represents the latest and most significant step of a process begun by Congress nearly five years ago to govern access to inside cabling in a manner that enables wireless cable operators and other multichannel video programming distributors ("MVPDs") to more effectively compete with franchised cable operators in single family homes and multiple dwelling units ("MDUs"). WCA has been an active participant on behalf of the wireless cable industry in this and related proceedings, and has frequently demonstrated that without full and fair access to previously

^{1/} *Telecommunications Services: Inside Wiring; Customer Services Equipment*, CS Docket No. 95-184, FCC 97-304 (rel. Aug. 28, 1997)[hereinafter cited as "*FNPRM*"].

installed inside wiring, wireless cable and other emerging technologies will be unable to fully compete with entrenched franchised cable providers.² Indeed, the *First Order on Reconsideration and Further Notice of Proposed Rulemaking* in this docket adopted a series of proposals advanced by WCA to simplify the procedures that govern the right of subscribers to purchase home wiring after terminating service pursuant to Section 16(d) of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),³ and the *FNPRM* proposes rules substantially similar to suggestions previously advanced by WCA.⁴

The Commission now requests comment on specific proposed rules pertaining to a single, albeit critical, issue -- the disposition of cable home run wiring in MDUs upon the termination of service from the incumbent MVPD.⁵ WCA fully supports the Commission's efforts to address this matter on an expedited basis, since immediate resolution of this issue will provide MVPDs some

^{2/} See, e.g. Comments of the Wireless Cable Association International, Inc., MM Docket No. 92-260 (filed Dec. 1, 1992); Reply Comments of the Wireless Cable Association International, Inc., MM Docket 92-260 (filed Dec. 14, 1992); Petition for Partial Reconsideration filed by the Wireless Cable Association International, Inc., MM Docket 92-260 (filed April 1, 1993); Reply of the Wireless Cable Association International, Inc., MM Docket 92-260 (filed May 28, 1993); Comments of the Wireless Cable Association International, Inc., MM Docket 92-260, RM-8380 (filed Dec. 21, 1993); Comments of the Wireless Cable Association International, Inc., CS Docket No. 95-184, (filed Mar. 18, 1996) [the "WCA Comments"]; Reply Comments of the Wireless Cable Association International, Inc., CS Docket No. 95-184, (filed April 17, 1996)[hereinafter cited as "WCA Reply Comments"]; Letter from Paul J. Sinderbrand, counsel to WCA, to Meredith Jones, Chief, Cable Services Bureau, CS Docket No. 95-184 (filed Oct. 2, 1996) [the "WCA Letter"].

^{3/} See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 11 FCC Rcd 4561, 4570-75 (1996) [the "*First Reconsideration Order*"].

^{4/} See WCA Reply Comments, at 3.

^{5/} See *FNPRM*, at ¶ 2.

badly needed certainty as to the “rules of the road” in the MDU environment when a building owner or an individual tenant wishes to switch service providers.

Accordingly, WCA intends to honor the Commission’s request that the parties not repeat the comments they have already submitted in response to the *Notice of Proposed Rulemaking* in CS Docket No. 95-184 and the *First Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 92-260.⁶ The Commission should note, however, that adoption of the rules proposed in the *FNPRM*, even with the minor modifications WCA suggests below, will not fully address the problems faced by MVPDs seeking to compete in the MDU market. To the contrary, before there can be full and fair competition in the MDU market, the Commission will need to adopt WCA’s proposals for (1) Commission preemption of discriminatory state mandatory access laws⁷ and (2) a “fresh look” policy with respect to long-term exclusive contracts between MDU owners and cable operators.⁸ WCA thus looks forward to the Commission’s resolution of these issues in conjunction with resolution of the issues raised in the *FNPRM*.

To further assist the Commission in realizing its intent “to act quickly” on its proposed rules, WCA will refrain from discussing in great detail those elements of the *FNPRM* with which it is in full agreement. Instead, WCA will focus on proposed minor modifications to the Commission’s proposed rules which will (1) minimize opportunities for incumbents to engage in anticompetitive conduct that inevitably deters MDU owners from considering alternative service providers, and (2)

^{6/} See *id.*

^{7/} See WCA Comments at 6-10.

^{8/} See WCA Letter at 2-4.

ensure a seamless transition from the incumbent to the new service provider where an MDU owner or individual tenant no longer wishes to receive the incumbent's service.

II. DISCUSSION.

A. The Commission's Rules Must Include Substantial Penalties for Incumbent Cable Operators Who Violate or Manipulate the Commission's Proposed Procedures for Disposition of Home Run Wiring Upon Termination of Service.

As noted in the *FNPRM* and demonstrated repeatedly by cable's competitors throughout the course of the Commission's inside wiring proceedings, MDU owners generally are extremely reluctant to switch MVPD service providers if there is any possibility that the new provider will have to "postwire" common areas rather than use the incumbent MVPD's existing wiring.⁹ Thus, while as a general matter WCA applauds the Commission's resolve to address home run wiring in MDUs in an expedited manner, WCA remains concerned that the Commission's proposals may not achieve their intended result to the extent that they allow an incumbent cable operator to remove its wiring and thereby force a postwiring of MDU property. So long as incumbents can threaten to remove installed wiring and force a postwiring, many MDU owners will remain reluctant to give alternative service providers access to their buildings. Nonetheless, in light of the Commission's willingness to expedite this matter, WCA believes that the Commission's proposals, subject to the modifications suggested below, represent a significant step in the right direction and should be implemented as soon as possible.

WCA believes that the Commission's pro-competitive objectives will be thwarted unless its rules are crafted to severely penalize any incumbent cable operator who manipulates the "remove,

^{9/} See, e.g., *FNPRM* at ¶ 26.

abandon or sell” election to prevent a competing MVPD from entering MDU property and commencing service. At the heart of WCA’s concern here is the fact that home run wiring has little salvage value, and thus incumbent cable operators historically have been unwilling to devote any time and expense to removing it. However, under the proposed transitional program, an incumbent will have a strong incentive to advise the MDU owner that it will be removing its wiring upon termination of service. The resulting predicament for the incumbent’s competitor is obvious: when an incumbent who receives a notice of termination elects removal, the competitor is forced to undertake a postwiring that substantially raises the competitor’s costs of entry since it cannot run the risk that the incumbent will ultimately abandon its wiring. While the *FNPRM* implies that there is some unstated public benefit in allowing incumbents to remove installed wiring (although that benefit is far from clear, particularly since wiring that is removed can rarely be reused), the Commission should not allow incumbents to “game” the system by electing removal, forcing the newcomer to postwire the building and then not even undertake the expense of removing the wiring that the incumbent could have employed. As the Commission has recognized, “such conduct could put the alternative service provider to the unnecessary burden and expense of installing a second set of home run wires when the incumbent has no intention of removing the existing wiring.”¹⁰ Absent relief, the net effect will be that subscribers will see less, not more, competition in the MDU environment.

WCA thus requests that the Commission make two modifications to its proposed rules to address this problem. Specifically, the Commission should make it absolutely clear that: (1) an

^{10/} See also *FNPRM* at ¶ 36.

incumbent cable operator's election to remove home run wiring is an *irrevocable* commitment that the incumbent will do so within the time frames specified in the Commission's rules; and (2) any subsequent failure by the incumbent to timely remove its home run wiring and restore the premises will be treated as a serious violation of the Commission's Rules, punishable by substantial forfeiture and, in the case of willful or repeated violations, a declaration that the incumbent is unqualified to serve as a Commission licensee.¹¹ By clarifying the binding nature of the removal election in this manner, the Commission will put all incumbent cable operators on notice that the removal election is not to be given lightly and that they will be subject to severe Commission sanctions if they elect removal but then abandon the wiring at the end of the transition period.¹²

In order for this approach to be effective, the Commission must impose substantial forfeitures on any incumbent cable operator who elects removal but then fails to do so. Absent the threat of a severe financial penalty, many cable operators are likely to routinely to make false removal elections, since the economic benefit derived from thwarting a competitor far outweighs the relatively minor inconvenience of a minimal Commission forfeiture. Indeed, the Commission itself has recognized that "for a forfeiture to be an effective deterrent against [such] entities, the forfeiture must be issued at a high level."¹³

^{11/} Of course, the forfeiture will be in addition to the proposed provision that the wiring will be deemed abandoned if not removed in a timely manner.

^{12/} Similarly, the Commission should clarify an incumbent's election to abandon home run wiring will be an irrevocable commitment and that the incumbent will be subject to sanctions if it in any way fails to satisfy those commitments (*e.g.*, where the cable operator elects abandonment but then disables the wiring).

^{13/} *In the Matter of The Commission's Forfeiture Policy Statement and Amendment of Section*
(continued...)

To ensure that any Commission forfeiture for an incumbent cable operator's false removal election has a sufficient deterrent effect, any base forfeiture imposed by the Commission for a false removal election must be applied to each individual MDU unit affected by the cable operator's failure to remove its home run wiring.¹⁴ For this purpose, WCA recommends that the base per-unit forfeiture for a false removal election be no less than \$500 per-unit, subject to upward adjustments under the Commission's existing forfeiture rules (i.e., where the offending party is a large and profitable entity, or where the offending party's conduct is egregious, causes substantial harm or is unlikely to be deterred by a lower base forfeiture.)¹⁵ In no event should the total base forfeiture for a false removal election be less than the forfeiture applicable to a cable operator who commits a single act of misrepresentation or lack of candor, i.e., \$27,000.¹⁶

While admittedly severe, the assessment of forfeitures in this manner represents the only truly effective means of counteracting the cable industry's enormous economic incentive to prevent competitive entry by new service providers in the MDU environment.

^{13/} (...continued)

1.80 of the Rules to Incorporate the Forfeiture Guidelines, CI Docket No. 95-6, FCC 97-218, at ¶ 24 (rel. Jul.28, 1997)[emphasis added] [citations omitted][the "*Forfeiture Order*"].

^{14/} In other words, WCA requests that for purposes of calculating the applicable total forfeiture, the Commission should determine that the cable operator has committed a "single violation" of the removal requirement with respect to each affected unit in the building, and not merely as a single violation applicable only to the building as a whole.

^{15/} *Forfeiture Order* at ¶ ¶ 24, 27; 47 C.F.R. § 1.80.

^{16/} *Id* at ¶ 2 n.3; 47 C.F.R. § 1.80.

B. The Commission Should Clarify That The Proposed Notice Periods Continue to Run Even Where An Incumbent Cable Operator Makes a Claim That It Has A Legally Enforceable Right To Remain On the Property.

Under the Commission's proposed rules, the procedures for disposition of home run wiring upon termination of service (whether on a building-by-building or unit-by-unit basis) only apply where the incumbent cable operator has a "legally enforceable right" to remain on the premises after the applicable notice period. WCA believes that the "legally enforceable right" exception potentially represents a substantial loophole that will be exploited by incumbent cable operators, and further demonstrates why the Commission ultimately should preempt state mandatory access statutes and adopt a "fresh look policy" for existing MDU service contracts as proposed by WCA.

Above all else, it must be remembered that the Commission's proposed procedures "are intended to provide all parties sufficient notice *and certainty* of whether and how the existing home run wiring will be made available to the alternative video service provider *so that a change in service can occur efficiently.*"¹⁷ As the Commission has recognized, this uncertainty has significantly deterred video competition in the MDU environment.¹⁸ To provide the requisite certainty, the Commission has requested comment on whether it should adopt a presumption "that the incumbent does not possess an enforceable legal right to maintain its home wiring on the premises (and that

^{17/} *FNPRM* at ¶ 33 (emphasis added).

^{18/} *See id.*

therefore that [the Commission's] proposed procedures would apply), unless the incumbent can adduce a clear contractual or statutory right to remain."¹⁹

While WCA generally supports the Commission's objective placing the burden on the incumbent to establish its right to remain — the proposal advanced in the *FNPRM* is problematic. Unfortunately, the Commission does not indicate what will constitute a "clear contractual or statutory right to remain." History has shown that the determination of an incumbent cable operator's rights upon termination of service rarely is a matter of merely searching the text of the relevant statute or MDU service contract for "magic language" that gives the incumbent an unassailable right to remain on the property. Indeed, the issue of whether the incumbent has a "clear" right to remain is often the subject of litigation, especially since the cable industry has found that it can gain competitive advantage by forcing MDU owners and alternative MVPDs into expensive, protracted litigation.

For the reasons WCA has advanced in prior filings in this proceeding, the most effective way for the Commission to resolve this problem definitively is to preempt all state mandatory access statutes and adopt a "fresh look" policy for existing MDU service contracts, and thereby take the "clear legal right to remain" issue out of the incumbent cable operator's hands in most cases. However, in the absence of any further action on the preemption and "fresh look" issues raised by WCA and others in these proceedings, WCA believes that the Commission can and should take some interim steps that will alleviate the problems described above.

^{19/} *Id.* at ¶ 34 (emphasis added).

First and foremost, the Commission should clarify that in the event of a dispute between the MDU owner and the incumbent over the right of the incumbent to remain on the premises, the Commission's rules governing building-by-building and unit-by-unit disposition of home run wiring will continue to apply until a court either rules upon the dispute or temporarily enjoins displacement of the incumbent. To eliminate uncertainty, this provides a mechanism for the Commission's procedures governing disposition of home run wiring to go into effect and be completed within the relevant notice period, unless the incumbent successfully obtains a legal determination of its right to either temporarily or permanently remain before the notice period terminates. While any displacement of the incumbent under this approach would be without prejudice to the rights of the incumbent should its position ultimately be upheld in court, it provides a level of certainty to MDU owners and alternative service providers that will promote the introduction of competition in MDUs.

Second, WCA supports the Commission's proposal to include a provision in its rules stating that where a mandatory access statute gives a cable operator access rights to an MDU only if a resident requests service, the provider's right to remain is extinguished once the resident terminates the provider's service.²⁰ As noted in the contemporaneous comments submitted by Residential Communications Network, Inc. ("RCN"), however, in certain mandatory access states (*e.g.*, New York, New Jersey and Washington, D.C.) a cable operator's access right is not expressly predicated upon a subscriber's request for service. This, of course, creates an opportunity for incumbent cable operators to claim that the Commission's proposal is limited only to those states where the access right is explicitly predicated on a subscriber's request for the cable operator's service. Accordingly,

^{20/} *FNPRM* at ¶ 39 n.100.

for the reasons set forth in RCN's Comments, WCA submits that the Commission should clarify that *no* mandatory access statute authorizes an incumbent to block access to the demarcation point with unused home run cables or conduits or moldings, regardless of whether the access right is predicated upon a subscriber request for service.²¹

C. The Commission's Rules Should Be Modified To Ensure A Seamless Transition From The Incumbent To A New Service Provider.

WCA emphasizes that it strongly supports the Commission's proposal to adopt "a general rule requiring the parties to cooperate to ensure as seamless a transition as possible."²² Although the *FNPRM* suggests that such a rule may be unnecessary because the incumbent would not want to burden potential future customers, it has been the experience of WCA's members that incumbent cable operators place far more value on frustrating competition than on building goodwill with their subscribers, and thus are unlikely to cooperate with a competitor to minimize disruptions.

^{21/} As noted by RCN, such a declaration would not constitute "preemption" in the case of New York, New Jersey and Washington, D.C. (though that is the result ultimately desired by WCA), since it is completely consistent with and already incorporated into the relevant mandatory access statutes. RCN points out that the New York, New Jersey and Washington, D.C. mandatory access statutes all provide that the cable company has to make its installation in a manner that does not interfere with the convenience of non-subscribers. The Commission has already declared, under federal law, that the convenience of a non-subscriber includes the opportunity to use cable home wiring to receive service from an alternative provider. Furthermore, the general cable laws for New York, New Jersey and Washington, D.C. all provide that the states' cable statutes shall conform with federal law and FCC regulations. Thus a declaration from the Commission that a cable company cannot block conduits or moldings with unused cable under a mandatory access law is not an exercise of preemptive jurisdiction. Rather, as RCN notes, it is a statement of federal policy which becomes applicable in those states by operation of the protection accorded non-subscribers under the states' own mandatory access statutes. There is no conflict with the states' cable laws because those laws expressly require that the mandatory access statute be consistent with federal law.

^{22/} *FNPRM* at ¶ 48.

Accordingly, a strongly worded rule (with an explicit threat of substantial forfeitures) is necessary to encourage incumbent cable operators to break their historical pattern of non-cooperation with new service providers.²³

In the same vein, WCA also believes that the Commission should consider some limited “fine tuning” of its procedural timetables to facilitate a smooth transition to a new entrant, particularly where an MDU owner allows the incumbent and the new entrant to compete head-to-head in the same building. Under the Commission’s current timetables for unit-by-unit disposition of home wiring, an incumbent cable operator has 90 days lead time before it must allow a competitor to have access to each unit in the building (*e.g.*, the MDU owner’s 60-day notice that intends to allow a competitor to enter the property, plus the incumbent’s 30-day period within which to make a uniform “remove, abandon or sell” election for all home run wiring in the building).²⁴ This provides the incumbent with an almost insuperable marketing advantage, since the 90-period gives the incumbent more than ample time to price or restructure its service offerings and/or lock individual subscribers into long-term service contracts before its competitor even arrives on the property. Clearly, this chills competition by tilting the playing field far too much in favor of the incumbent, and thus does not serve the public interest.

^{23/} At a minimum, the rule should provide that the incumbent who elects removal cannot do so until the new provider has connected its own wiring to the subscriber’s unit, and that an incumbent may not disable any abandoned wiring for any reason.

^{24/} *FNPRM* at ¶ 39.

Accordingly, WCA supports the more expedited timetable being proposed in comments filed by the Independent Cable & Telecommunications Association ("ICTA") for unit-by-unit disposition of home wiring. Specifically, under ICTA's proposal:

- (1) an MDU owner must give the incumbent *fifteen* (as opposed to sixty) days notice that it intends to allow a competitor to provide service on its property;
- (2) on the fifteenth day, the incumbent must make its "remove, abandon or sell" election for all home run wiring in the building;
- (3) where the incumbent elects to remove its home run wiring, it cannot do so until at least seven days after the new entrant has connected its own home run wiring to the individual unit;
- (4) where the incumbent elects to abandon its home run wiring, the abandonment becomes effective for all units immediately;
- (5) where the incumbent elects to sell its home run wiring, it must offer a firm price for all home wiring in the building on the election date;²⁵
- (6) if the parties fail to agree on a price within thirty days of the incumbent's election to sell, then on the thirtieth day the incumbent must elect to either remove (subject to the new entrant's prior right to attach) or abandon the wiring (such abandonment to take effect for all home run wiring in the building immediately).

For the reasons set forth above and in ICTA's comments on the *FNPRM*, WCA believes that this timetable will more effectively accomplish a fair and seamless transition that balances the needs of incumbents and new service entrants and thereby promotes MVPD competition demanded by MDU owners and their tenants.

^{25/} To lend greater certainty to the Commission's timetables for building-by-building disposition of home run wiring, WCA similarly recommends that a similar time frame for a firm offer of sale also be applied to situations where the MDU owner seeks to replace the incumbent with a new provider rather than allow both to compete head-to-head in the same building.

D. Where The Cable Home Wiring Demarcation Point Is Physically Inaccessible, the Commission Should Declare That the Demarcation Point Will Be Located At The Junction Box or As Close As Possible Thereto.

The Commission recognizes that the 12-inch demarcation point for cable home wiring may be imbedded in common areas (*i.e.*, inside the walls or in conduit running to the subscriber's individual unit), and thus is inaccessible both to the subscriber and his or her service provider. The Commission proposes that in these situations the demarcation point should be moved back to the point at which it first becomes "physically accessible," and requests comment as to how it should define "physically accessible."²⁶ WCA recommends that the Commission declare that the demarcation point for cable home wiring is "physically accessible" if it can be reached without cutting into walls or conduit within common areas. WCA further recommends that where the demarcation point is not "physically accessible," the demarcation point must be moved away from the unit and toward the feeder cables of the incumbent to the point where the alternative provider has reasonable access to the cable home wiring, *i.e.*, the junction box.

III. CONCLUSION.

Again, WCA commends the Commission for committing to resolve the issues raised in the *FNPRM* on an expedited basis. Though WCA believes that the Commission's inside wiring rules still require additional "fine tuning" to incorporate preemption of state preemption of mandatory access statutes and a "fresh look" policy for existing long-term service contracts, the Commission's proposed rules governing disposition of home run wiring by and large will create more opportunities for alternative MVPDs to compete on a fair and equitable basis with incumbent cable operators in


^{26/} *FNPRM* at ¶ 84.

the MDU environment. WCA thus urges the Commission to adopt the rules proposed in the *FNPRM* as quickly as possible, subject to the modifications suggested above.

WHEREFORE, for the reasons set forth herein, the Wireless Cable Association International, Inc. requests that the Commission adopt the rules proposed in the *FNPRM* with the modifications recommended in these comments.

Respectfully submitted,

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